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Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

Petitioner,

v.

[redacted] ALVAREZ-MACHAIN,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE
[redacted]
IN SUPPORT OF RESPONDENT

[redacted]
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-712

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

Pursuant to Rule 37 of the Rules of this Court, the United Mexican States (Mexico) respectfully submits this brief as *amicus curiae* in support of affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit of October 18, 1991. By letters lodged with the Clerk of the Court, the petitioner and the respondent have consented to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

The respondent, Humberto Alvarez-Machain, is a national of Mexico. Until his abduction from Mexican territory, arranged by United States law enforcement officers, he was a resident of Mexico. Respondent was forcibly brought to Los Angeles where he was charged in federal

court with complicity in the kidnapping and murder of a DEA agent in Mexico.

On this writ of certiorari, the Court will necessarily consider whether respondent's forcible removal from Mexican territory was in contravention of the existing extradition treaty with Mexico and of general principles of international law, mandating respondent's return to Mexico.

Mexico regards respondent's abduction from Mexican territory as a deliberate disregard by the United States of its obligations under the extradition treaty. Respondent's abduction by agents of the United States is incompatible with established principles of international law and with express undertakings by the United States in recent bilateral and multilateral agreements on mutual legal assistance in penal matters and on cooperation in combatting narcotics trafficking that were in force between Mexico and the United States at the time of respondent's abduction. Under general international law, and under these specific agreements, the United States is obligated to respect Mexico's sovereignty and territorial integrity and not to perform functions of authority in Mexican territory.

Mexico repeatedly protested to the United States government the treaty violations and the attendant infringement of its territorial integrity, and it requested respondent's return to Mexico. Its diplomatic protests and its request for respondent's repatriation have gone unanswered.

The United States' disregard of its commitments to Mexico undermines the rule of law in international relations to which both States are strongly committed. Mexico has a manifest interest in ensuring that treaties to which it and the United States are parties are interpreted and applied by United States courts consistently with the treaty's text, history, object and purpose.

STATEMENT

1. The Mexican Government's Protests

The respondent challenged the district court's jurisdiction to try him on the ground that his forcible abduction from his homeland by officials of the United States violated the Mexico/United States extradition treaty.[1] (Pet. App. 4a).

Mexico repeatedly protested respondent's abduction through diplomatic channels. Mexico's first note to the United States Department of State of April 18, 1990 (J.A. 33), sought information on the participation of United States officials in the abduction of respondent. The note placed the Department of State on notice that "if it is proven that these actions were performed with the illegal participation of the U.S. authorities, the binational cooperation in the fight against drug trafficking will be endangered." (*Ibid.*).

One month later, on May 16, 1990 (J.A. 35), Mexico informed the Department of State that "[t]he Government of Mexico considers the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. government, in violation of the procedure established in the extradition treaty in force between the two countries." The note informed the Department that criminal proceedings had been instituted in Mexico against the abductors for the offenses of kidnapping, false imprisonment and criminal association, and that the Mexican government would seek the abductors' extradition. The note requested that the Department of State "interven[e] before the corresponding authorities so that Dr. Humberto Alvarez Machain be returned back to

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[1] Extradition Treaty between the United States of America and the United Mexican States with Appendix, done in Mexico May 4, 1978, entered into force January 25, 1980, 31 U.S.T. 5059, T.I.A.S. No. 9656, registered by the United States in the United Nations Treaty Series as U.N.T.S. 19462 on December 9, 1980, pursuant to Article 102 of the Charter of the United Nations; reprinted in J.A. 72-87.

Mexico in order to be investigated regarding his probable participation in the crimes whose investigation and prosecution correspond to [*sic*] the Mexican Government." The note concluded with a request for assistance "in order that . . . [the respondent] be tried and sentenced in Mexico with absolute respect to the Mexican laws in connection with the crimes in which . . . [the respondent] has participated." (J.A. 36).

Thereafter, on July 19, 1990, the Embassy of Mexico presented two notes to the Department of State (J.A. 39, 53), and transmitted two extradition requests from the Attorney General of Mexico for the provisional arrest and extradition of the two individuals who were principally responsible for respondent's abduction from Mexico—a DEA agent, and a Mexican national who had been granted refuge in the United States. The United States did not respond to these notes.

On appeal, following the dismissal of the indictment by the district court, the Mexican Consul General in Los Angeles was instructed by the Ministry of Foreign Affairs to present a letter to the court of appeals setting forth Mexico's position with respect to the treaty, its violation by the United States, and the manner in which the treaty regulates the extradition of Mexican nationals from Mexico. (J.A. 67). The letter stated in relevant part:

> 8. The Treaty constitutes the exclusive and sole means by which the Government of the United States can seek to bring a Mexican national present in Mexico to justice. Mexican legislation in force and effect makes it illegal for Mexican government authorities to exclude a Mexican national from Mexican territory, or for Mexican Government authorities to deport a Mexican national from Mexican territory. Therefore Mexican Government authorities have not entered, and could not enter, into any special arrangement, either with the United States or with any other country, to surrender its own nationals.
>
> In the case of extradition treaties to which Mexico is a party, the Government of Mexico has invariably

> and expressly reserved to the parties the right to refuse the requested extradition to [*sic*] one of their own respective nationals, agreeing instead to prosecute them in their own national courts, in the interest of justice.
>
> 9. The purpose and object of the Treaty, was from its inception, precisely to provide the legal framework, with which one of the parties could request of the other the extradition of persons from the territory of the former to the territory of the latter. The Treaty is binding on its parties, but serves no purpose if the parties are free to ignore its terms.
>
> 10. The only legal means by which the United States could have pursued the prosecution of DR. HUMBERTO ALVAREZ MACHAIN, a Mexican national, was through the specific provision of the Treaty, which was negotiated, agreed upon and ratified precisely to deal, with the extradition of nationals. . . .

J.A. at 68-69.

2. The United States' Complicity in Respondent's Abduction

After respondent's arraignment, the district court held an evidentiary hearing to determine whether United States law enforcement officers were responsible for respondent's abduction. (Pet. App. 6a). Although the United States denied its complicity in the abduction, the court found that in the evening of April 2, 1990, respondent was seized by five or six armed men in his office in Guadalajara, put by force on a private plane, and flown to El Paso, Texas. There he was met by agents of the DEA and arrested. He was flown to Los Angeles, where he was placed in detention awaiting trial. (Pet. App. 10a-11a).

The district court further found that as of May 1991, the DEA had made partial reward payments of $20,000 to the Mexican individuals who abducted the respondent; that the DEA had evacuated seven of the abductors and their families from Mexico to the United States; that it

paid for their weekly living expenses (*ibid.*); that respondent's abduction did not result from any cooperative effort by Mexico and the United States, or any participation in the abduction by the Mexican officials; and that the United States "unilaterally proceeded with the abduction without the knowledge or participation of the Mexican government." (Pet. App. 33a).

The district court determined as a matter of law that the United States violated the Mexico/United States extradition treaty, and that "[u]nder these circumstances, the Court lacks jurisdiction to try this defendant. Accordingly, the defendant is ordered discharged and the government is ordered to repatriate the defendant to Mexico forthwith." (Pet. App. 4a-5a).

On appeal, the United States did not challenge the district court's findings regarding its instigation and complicity in respondent's abduction. The court of appeals affirmed *per curiam* (Pet. App. 1a), relying on its exhaustive treatment of the abduction issue in *United States v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *cert. pending*, No. 91-670, decided three months earlier. The court below concluded:

> The Government of Mexico has stated unequivocally that the abduction of Dr. Alvarez-Machain by United States agents violated the 1980 Extradition Treaty and general principles of international law and has at all times demanded his immediate repatriation to Mexico. Moreover, the Mexican government has stated its position on these issues unequivocally to the court in this case . . . . Thus, there remains no question about the adequacy of Mexico's protests in this case or about Mexico's demand for repatriation. . . . The *Verdugo* case requires the dismissal of the indictment and the repatriation of the appellee. [Pet. App. at 3a].

(Pet. App. at 3a). The United States seeks reversal in this Court. It maintains that respondent's abduction was in the nature of an "extraterritorial arrest," and is not inconsistent with the means provided for in the extradition

treaty for obtaining custody of persons from Mexico for trial in United States courts.

SUMMARY OF ARGUMENT

I.

A. The United States' argument that the extradition treaty does not address abductions of Mexican nationals from Mexican territory, and that such "extraterritorial arrests" are conducted "outside the extradition context" (Pet. Br. 9), does not withstand analysis. The treaty, like all international accords, must be interpreted against the background of relevant rules of international law applicable to the relations between the parties. Of particular relevance to the forcible removal of a person by agents of a foreign state are the established international law principles of independence of states, non-intervention in internal affairs, legal equality, and respect for territorial integrity. These principles are the foundation upon which all extradition treaties are constructed. For a state to send its agents to another State to apprehend or abduct that State's nationals for trial elsewhere is incompatible with the established international legal order. There was, therefore, no reason for Mexico to insist that the extradition treaty contain express language that, absent permission from Mexico, the United States could exercise no police powers in the Mexican territory. At no time during the negotiation of the extradition treaty did the United States' negotiators state or suggest that the United States reserved to itself the right to secure the presence of Mexican nationals for trial in the United States "outside the extradition context," and there exists no such reservation to the treaty.

B. Article 9 of the extradition treaty leaves it to the discretion of each State whether to extradite its nationals. During the negotiation of Art. 9, the Mexican negotiators expressly informed the United States negotiators of the restraints that Mexican laws impose on the President of Mexico with respect to the extradition of Mexican nationals. Consequently, the parties included a second para-

graph—similar to one contained in most modern U.S. extradition treaties with civil law countries—to assure that Mexicans whose extradition was denied solely on the basis of nationality would be prosecuted by Mexico.

In this case, the United States did not inquire whether Mexico was prepared to deliver the respondent for trial in the United States, nor did it afford Mexico the opportunity to try the respondent in its own courts. Instead, in disregard of the stipulations of the extradition treaty and its responsibilities under established principles of international law, the United States abducted the respondent from Mexico, brought him without the consent of the Mexican government to the United States for trial, and deprived him of the rights guaranteed to him by the Constitution and laws of Mexico.

C. Mexico and the United States are parties to two recent bilateral treaties on mutual legal assistance and on cooperation in combatting narcotics trafficking, and both States have ratified a multilateral United Nations Convention on the latter subject. Both treaties and the Convention make it explicit that, in rendering assistance to each other and in combatting crime and drug trafficking, the States must carry out their obligations in a manner consistent with the principles of sovereign equality and territorial integrity. The United States' action in abducting the respondent from the territory of Mexico was in total disregard of these solemn treaty commitments.

II.

The *Ker-Frisbie* rule, which holds that an illegal arrest or abduction does not void a subsequent conviction, is a rule of United States domestic law, not a principle of international law, and has been most often applied in the United States in the context of domestic kidnappings, abductions and wrongful arrests.

This Court has never sanctioned the prosecution in a United States court of a foreign national abducted from his home State by officials of the United States, where

an extradition treaty was in force with that foreign State, where the offense was committed in the territory of the foreign State, and where the foreign state protested the abduction.

Ker is no authority for the issue in this case. The rule's namesake, *Frisbie*, and its progeny, deal with domestic interstate abductions and are not relevant to the state-sponsored international abduction which lies at the heart of this case. International law, which this Court has traditionally applied, firmly establishes the principle that absent consent or acquiescence by the territorial State, another State may not send its agents into that State's territory to apprehend persons accused of a crime.

III.

The appropriate remedy for the contravention of the treaty that occurred in this case, and the only remedy that will prevent the recurrence of the violation of Mexico's territorial integrity, is the return of respondent to Mexico. Repatriation of a national who was unlawfully abducted from his home State by agents of a foreign State will signify the courts' unwillingness to countenance lawlessness by its law enforcement agents on foreign soil. Unlike the result which frequently follows from the application of the exclusionary rule in the domestic context, ordering the respondent's repatriation will not immunize him from prosecution, as the United States claims. His return to Mexico will only change the place of trial and the applicable law, since Mexico is committed under the extradition treaty to submit the case to its judicial authorities for investigation and prosecution.

ARGUMENT

I. ABSENT CONSENT BY MEXICO TO A LESS FORMAL RENDITION OF OFFENDERS, THE EXTRADITION TREATY PROVIDES THE SOLE MEANS BY WHICH THE UNITED STATES MAY SECURE AN OFFENDER FROM MEXICO

A. The Treaty Prohibits U.S. Government-Authorized or Sponsored Abductions of Persons From Mexican Territory for Trial in the United States

The thrust of the United States' argument is that the Extradition Treaty "is not a general compact for the protection of territorial rights." (Pet. Br. at 9). Elsewhere, the United States submits that the Extradition Treaty does not prohibit "extraterritorial arrests" by the United States "outside the context of extradition proceedings" (*Id.* at 23), and that "nothing in the treaty speaks to the consequences of an apprehension that is made without a request for extradition." (*Ibid.*). Mexico rejects in the strongest terms the view that the United States authorities may perform "extraterritorial arrests" in Mexico.

As a sovereign state, Mexico alone has the right to determine which authority exercises governmental powers in its territory, and no State may arrogate to itself the right to perform sovereign acts within its borders without its consent. The principles of sovereign equality and territorial integrity of States, the foundation of an enlightened international legal order, are fundamental. The principle was forcefully and unequivocally set forth by this Court, speaking through Chief Justice Marshall, in *The Schooner Exchange v. McFaddon*, 7 Cranch (11 U.S.) 116, 136 (1812):

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction.

> . . .
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

See also Art. 2, para. 4, of the Charter of the United Nations of June 26, 1945,[2] the members of which include Mexico and the United States, which obligates "All Members" to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any State . . . ." Additionally, the Charter of the Organization of American States of April 30, 1948,[3] whose members also include Mexico and the United States, provides in Art. 17 that the "territory of a State is inviolable; it may not be the object, even temporarily, . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatsoever." It is within this framework that the Mexico/United States Extradition Treaty must be interpreted.[4]

Extradition is one of the oldest forms of international judicial assistance. Extradition treaties are designed to promote the cooperation between States in criminal matters. They "balance[] the demands of the international le-

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[2] 59 Stat. 1031, T.S. No. 993.

[3] 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, as amended by the Protocol of Buenos Aires of February 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847.

[4] See Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31, *reprinted in* 63 Am.J.Int'l L. 875, 885 (1969):

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. . . .
>
> 3. There shall be taken into account, together with the context: . . . c. *any relevant rules of international law applicable in the relations between the parties.* [Emphasis added.]

gal order that serious crime not go unpunished with concern that persons accused of crime not be subjected to unfair methods of adjudication or punishment." *Restatement (Third) Foreign Relations Law of the United States* §476, comment *a* (1987). Since the beginning of extradition relations between Mexico and the United States one hundred thirty years ago, it has been clearly understood by both States that their extradition treaties were designed, among other things, to protect the sovereignty and territorial integrity of both States. United States Secretary of State Blaine acknowledged this principle well over a century ago when he advised the Governor of Texas that—

> The treaty of extradition between the United States and Mexico prescribes the forms for carrying it into effect, and *does not authorize either party, for any cause, to deviate from those forms, or arbitrarily abduct from the territory of one party a person charged with crime for trial within the jurisdiction of the other.*

4 Moore, *Digest of International Law* § 603, at 330 (1906), emphasis added.

That the United States regarded the extradition treaty as the exclusive means by which Mexico could secure a person from the United States was also made clear by Secretary of State Bayard in 1887 when a Mexican national was seized in Texas by a Mexican police officer with the aid of local deputy sheriffs and forced across the border to Mexico. Mr. Bayard stated that the wanted person's return to Mexico was "obtained not in accordance with, but in fraud of existing treaties." 2 Moore, *supra* § 204, at 276. Nothing in the negotiating history of the three successive extradition treaties that Mexico entered into with the United States, beginning in 1862,[5] or in the dip-

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[5] The precursors of the current extradition treaty between Mexico and the United States are the treaty of May 20, 1862, 12 Stat. 1199, T.S. No. 209 (terminated January 24, 1899), and the treaty of April 22, 1899, 31 Stat. 1818, T.S. No. 242, with supplements of 1903, 1926 and 1941 (terminated January 25, 1980).

lomatic correspondence between them following the entry into force of these treaties, lends support to the view pressed by the United States that the police authorities of the signatory states may, consistently with the detailed stipulations of an extradition treaty, make "extraterritorial arrests" in the territory of the other "outside the extradition context." (Pet. Br. at 21). The acknowledgement of this extraterritorial right in either Party would have constituted such a radical departure from the very raison d'être of extradition treaties, that it would have excited contemporary comment. No consent to arrests in the territory of the other party is discernible from the text, history or purpose of the treaty. The United States does not, and cannot, point to any source that would support its thesis—a thesis that it announces here for the first time. Had the United States at any time insisted on such a reservation to the treaty, its extradition relations with Mexico would have ended.

B. Respondent's Abduction Has Deprived Him of the Special Safeguards Stipulated in the Treaty for Nationals of the Signatory States

1. Article 9 of the 1978 extradition treaty provides (J.A. at 76):

> **Extradition of Nationals**
>
> 1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.
>
> 2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

This Article takes into account the provisions of the Mexican Law on International Extradition[6] which prohibit the extradition of its nationals. The United States fully understood this to be the law of Mexico and agreed in Art. 9 of the treaty that extradition of Mexican nationals was subject to a special regime.

In submitting the treaty to the Senate for its advice and consent, President Carter's message provided an article-by-article analysis prepared by the Department of State,[7] which described the import of Art. 9 thus:

> Article 9 deals with the extradition of nationals. It is similar to provisions in some of our other recently signed extradition treaties. It grants the executive the discretionary power to extradite its own nationals. If extradition is denied on the basis of nationality, the requested Party undertakes to submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense. *This article thus takes into account the law of Mexico prohibiting the extradition of its nationals but allowing for their prosecution in Mexico for offenses committed abroad.* [Emphasis added.]

The United States' brief makes light of the Mexican government's discharge of its domestic legal order when it complains that "to date, the government of Mexico has not extradited a single Mexican national under the terms of the extradition treaty pursuant to an extradition request by the United States." (Pet. Br. at 21 n. 17). The accompanying sentence in the text is ominous: "[N]othing in our

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[6] Art. 14 of the "Ley de Extradición Internacional" of December 22, 1975, provides:

> No Mexican shall be extradited to a foreign state except in exceptional cases in the discretion of the Executive. (Informal translation.)

[7] Exec. Rep. M, Extradition Treaty with the United Mexican States, 96th Cong., 1st Sess. VI (1979) (Letter of Submittal by Secretary of State Cyrus Vance).

extradition treaty with Mexico affirmatively indicates that a defendant who has been forcibly abducted from that country is immune from prosecution in an American court." (*Id.* at 20.) It then proceeds to justify the abduction by stating: "Yet if respondent is repatriated to Mexico, *he will acquire just such an immunity from prosecution.*" (*Id.* at 20-21, emphasis added). The assertion is demonstrably false.

A Mexican national accused of having committed a crime on Mexican soil does not, by reason of being abducted to a foreign country, become "immune" from prosecution. Along with all citizens and residents, he enjoys the rights guaranteed to him by the Constitution, treaties and laws of Mexico.[8] One of these rights is to be tried by the courts of Mexico for an offense committed in Mexico. The United States' abduction seeks to deny to the respondent that right—a right also guaranteed by Article 9(2) of the extradition treaty.[9] There can, of course, be no question that

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[8] The Mexican Political Constitution provides in relevant part:

> Article 14. . . . No person shall be deprived of life, liberty, property, possessions, or rights without a trial before a previously established court in which the essential formalities of procedure are observed in accordance with laws in effect prior to the act.
>
> In criminal cases no penalty shall be imposed by mere analogy on convincing rationale but rather must be based on a law which is in precisely applicable to the crime in question. . . .
>
> Article 16. No one shall be disturbed in his person, family, domicile, documents or possessions except by virtue of a written order by the competent authority stating the legal grounds and justification for the action taken. No order of arrest or detention shall be issued against any person other than by the competent judicial authority, unless such arrest or detention is preceded by a charge, accusation, or complaint concerning a specific act punishable by physical punishment, made by a credible party, supported by a sworn affidavit or by other evidence indicating the probable guilt of the accused; . . .

[9] Mexican municipal law makes no distinction between "self-executing" treaties and those that merely constitute a contract between States,

the courts of Mexico are competent and obligated to try the offenses with which the respondent is charged.

The United States-sponsored abduction plainly denied to the respondent the procedural rights guaranteed to him by Articles 14 and 16 of the Mexican Constitution, by Article 3 of the extradition treaty[10] and by Article 16 of the Mexican Extradition Law,[11] to have the inculpating

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as known in United States law.

Article 133 of the Mexican Political Constitution provides:

> This Constitution, the laws of the congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of each State shall conform to the said Constitution, the law, and treaties, notwithstanding any contradictory provisions that may appear in the Constitution or laws of the States.

A treaty that has been approved by the Mexican Senate and proclaimed by the President forms part of the municipal law of Mexico and confers personal rights on individuals that are enforceable in Mexican courts.

[10] Article 3 of the treaty provides in relevant part:

> Evidence Required
>
> Extradition shall be granted only if the evidence be found sufficient, according to the laws of the requested Party, . . . to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place. . . .

[11] Article 16 of the Mexican Extradition Law requires that the Mexican authorities be furnished:

> The formal extradition request and the documents on which it is based by the requesting State must include:
>
> I. Specification of the crime for which the extradition is sought.
>
> II. Proof that the crime has been committed and the probable involvement of the accused. If the accused has been convicted by the courts of the requesting state, it will suffice to submit an authenticated copy of the final judgment.

evidence against him reviewed by an impartial Mexican magistrate before he was deprived of his liberty.

The United States' answer to the deprivation of all of these rights is simply that since respondent was not extradited under the treaty, he has no rights. (Pet. Br. at 13). Mexico disagrees. The extradition treaty governs comprehensively the delivery of all persons requested for extradition "for an offense committed within the territory of the requesting Party" (Article 1(1), and, as in this case, for an offense committed inside the territory of the requested party. (Article 1(2).) In consequence, the United States' failure to use the extradition treaty deprived Mexico of its sovereign right to prosecute the respondent in its domestic courts and denied to respondent the rights guaranteed him by the Mexican Constitution, treaties and laws. The frustration and denial of these rights constitute independent material breaches of the treaty.

C. Respondent's Abduction Violated Three Other Recent Accords Between Mexico and the United States

Three other accords presently in force between Mexico and the United States emphasize Mexico's willingness to provide the fullest cooperation in combatting crime and narcotics trafficking, and in providing effective and timely legal assistance to the United States. The United States' brief treats these accords with silence.[12]

III. . . .

IV. A copy of the legal provisions of the requesting State, with regard to the definition of the crime and the punishment, and the corresponding statute of limitations, as well as an authorized statement of the fact that said provisions and statute were in force at the time the crime was committed.

V. The original warrant of arrest which may have been issued against the accused.

[12] The treaties described in the text provide a "relevant rule of [con-

First, the 1987 Treaty of Cooperation for Mutual Legal Assistance[13] expresses in its preamble the commitment of both States "to cooperate in the framework of their friendly relations, and to undertake mutual legal assistance *to provide the best administration of justice in criminal matters.*" (Emphasis added). Thereafter, paragraph 2 of Article 1 of the Treaty sets forth the understanding of both States that—

> This Treaty *does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority* exclusively entrusted to the authorities of that other Party by its national laws or regulations. [Emphasis added.]

Second, the 1989 Agreement on Cooperation in Combatting Narcotics Trafficking and Drug Dependency[14] emphasizes in Article I, that—

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ventional] international law" that governs the relations between Mexico and the United States within the purview of Art. 31(3) of the Vienna Convention on the Law of Treaties, *supra*, n.4.

[13] Treaty of Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, done in Mexico City December 9, 1987, entered into force for the United States May 3, 1991, T.I.A.S. No. ____, *reprinted in* 27 I.L.M. 443 (1988). Article 1 provides as follows:

> SCOPE OF THE TREATY
>
> 1. The Parties shall cooperate with each other by taking all appropriate measures that they have legal authority to take, in order to provide mutual legal assistance in criminal matters, in accordance with the terms of this Treaty and subject to the limitations of their respective domestic legal provisions. Such assistance shall deal with the prevention, investigation and prosecution of crimes or any other criminal proceedings arising from acts which are within the competence or jurisdiction of the requesting Party at the time the assistance is requested, and in connection with ancillary proceedings of any other kind related to the criminal acts in question.

[14] Agreement between the United States of America and the United

2. The Parties will fulfill their obligations under this Agreement *in accordance with the principles of self-*

Mexican States on Cooperation in Combatting Narcotics Trafficking and Drug Dependency, done in Mexico City February 23, 1989, entered into force July 30, 1990, T.I.A.S. No. ____ , *reprinted in* 29 I.L.M. 58 (1990). The preamble and Article I state as follows:

> The United States of America and the United Mexican States (the Parties),
>
> Aware of the need to protect the lives and health of their respective peoples from the serious effects of narcotics trafficking and drug dependency,
>
> Agreeing that such conduct should be attacked comprehensively from four major areas: prevention and reduction of the illicit demand for narcotics and psychotherapic substances; control of supply; suppression of illicit traffic; treatment and rehabilitation,
>
> Acknowledging that the various aspect of narcotics trafficking and drug dependency threaten the security and the essential interests of each of the Parties;
>
> Resolved to extend to each other the necessary cooperation to effectively combat narcotics trafficking and drug dependency, given the international scope and nature of these phenomena;
>
> Encouraged by the spirit of the recommendations contained in the Comprehensive and Multidisciplinary Plan of Future Activities in the Control of the Improper Use of Drugs (the Plan) adopted at Vienna, Austria, on June 26, 1987, and
>
> Inspired by the goal that cooperation under this Agreement complement the cooperation that both Parties provide in fulfillment of their international obligations under the United Nations Convention on Illicit Trafficking in Narcotics and Psychotropic Substances (the Convention), adopted at Vienna, on December 20, 1988,
>
> Have agreed as follows:
>
> ARTICLE I
> Scope of the Agreement
>
> 1. The purpose of this Agreement is to promote cooperation between the Parties so that they can combat more efficiently

determination, non-intervention in internal affairs, legal equality, and respect for the territorial integrity of States.

3. *This Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority* exclusively entrusted to the authorities of that other Party by its national laws or regulations. [Emphasis added.]

Third, the multilateral 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs, which both Mexico and the United States have ratified,[15] echoes the pro-

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narcotics trafficking and drug dependency, phenomena that transcend the boundaries of both countries.

The Parties shall adopt the necessary measures in fulfillment of the obligations they have entered into under this Agreement, including legislative and administrative measures, in conformity with the fundamental provisions of their respective internal legal systems.

2. The Parties will fulfill their obligations under this Agreement in accordance with the principles of self-determination, non-intervention in internal affairs, legal equality, and respect for the territorial integrity of States.

3. This Agreement does not empower one Party's authorities to undertake, in the territorial jurisdiction of the other, the exercise and performance of the functions or authority exclusively entrusted to the authorities of that other Party by its national laws or regulations.

[15] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna December 20, 1988, entered into force for the United States and for Mexico on November 11, 1990, T.I.A.S. No. ____, *reprinted in* 28 I.L.M. 493 (1989), defines the scope of the Convention as follows:

Article 2

SCOPE OF THE CONVENTION

1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances

visions of the two bilateral agreements between Mexico and the United States with respect to the observance of the principles of sovereign equality and territorial integrity by the High Contracting Parties.

These accords establish no new norms for the conduct of States. They codify the established rule of international law prohibiting the authorities of one State from performing police or other enforcement functions in the territory of another State without the express permission of the latter, and the principle that extradition treaties are designed, *inter alia*, to protect the territorial integrity and sovereignty of the Contracting States. (See *supra*, pp. 10-12). The United States conspicuously disregarded these principles, and the reciprocal pledges contained in these international accords when its agents arranged for respondent's forcible removal from Mexico.

II. THE RULE ANNOUNCED IN KER V. ILLINOIS DOES NOT GOVERN THIS CASE

Ker v. Illinois,[16] decided more than a century ago, concerned the prosecution in an Illinois court of an American citizen who was charged with larceny and embezzlement from a Chicago bank. Ker fled to Peru to escape prosecution and was forcibly returned by a private Pinkerton agent to Chicago to stand trial. Although the agent carried an extradition warrant for Ker's arrest which was to be

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having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

2. *The Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.*

3. *A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.* [Emphasis added.]

[16] 119 U.S. 436 (1886).

presented to the local authorities, on his arrival in Lima, the agent found that the city was occupied by military forces of Chile. There apparently was no Peruvian government to which the extradition warrant could be presented.[17] The agent apprehended Ker and brought him forcibly to Chicago where he was tried and convicted. Peru at no time protested Ker's abduction.

The Illinois Supreme Court sustained the conviction and rejected Ker's defenses that the manner in which he had been brought before the court denied him due process of law and that as a result of his presence in Peru he had acquired a "positive right" that he could be removed from that country only under the extradition treaty. *Ker v. Illinois*, 110 Ill. 625 (1884). On writ of error to this Court, Ker again raised both defenses. Speaking for a unanimous Court, Justice Miller rejected the due process argument:

> The "due process of law" here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled.

119 U.S. at 440.

The Court dismissed the asylum argument, stating:

> There is no language in this treaty, or in any other treaty made by this country on the subject of extradition of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; . . .

119 U.S. at 442.

As regards the extradition treaty with Peru, the Court observed:

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[17] The additional historical facts, not recorded in the Court's opinion, are taken from Fairman, *Ker v. Illinois Revisited*, 47 Am.J.Int'l L. 678 (1953).

> Julian [the Pinkerton agent], in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, *and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.*

119 U.S. at 443, emphasis added.

Most relevantly to the present case, the Court declined to consider whether this private abduction constituted a violation of international law, leaving final determination of that question to the state courts as a matter of state law:[18]

> The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. . . .
>
> However, this may be, the decision of that question is as much within the province of the State court, as a question of common law, or of the law of the nations, of which that court is bound to take notice, as it is of the courts of the United States. *And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.*

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[18] It was less than three decades ago, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1984), that the Court squarely ruled that international law is *federal* law, and that state courts must follow the federal lead in ascertaining, interpreting and applying that body of law."[R]ules of international law should not be left to divergent and perhaps parochial state interpretations." *Id.* at 425.

119 U.S. at 444, emphasis added.

The distinctions between the factual and legal underpinnings of *Ker* and the instant case are palpable and striking:

- In 1886, the legal protections afforded to individuals throughout the civilized world today and the emerging international law of human rights did not exist.
- Ker's abduction by a private agent was "without any pretense of authority . . . from the government of the United States." 119 U.S. at 443; here, the Court is faced with an abduction sponsored and financed by the United States and carried out by agents of the United States in the performance of their official functions.
- Ker, unlike the respondent, was a United States citizen who, under established doctrine, cannot invoke international law against his own sovereign, but must be satisfied with such protections as the Constitution and laws of the United States may afford to him; respondent is not so limited.
- Ker, unlike respondent, was charged with offenses which he committed solely in this country and he became a "fugitive from justice" in the dictionary sense of the term when he fled from the United States; respondent is charged with no offense committed in the United States and he did not flee to escape prosecution, nor did he seek asylum elsewhere.[19]
- It is subject to doubt whether the extradition treaty between the United States and Peru was in force at the time of Ker's abduction, in light of the political instability in Peru when Ker was abducted; no such doubt exists here.

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[19] Aside from the provisions of the extradition treaty, under international law Mexico has the primary right to place him on trial, both under principles of territoriality and nationality.

- *Ker* was a state prosecution in the 19th century, not a federal prosecution conducted in the last decade of this century.

- Peru at no time protested Ker's abduction through channels of diplomacy or by appearance in the United States courts, either at trial or on appeal.

It would be presumptuous for Mexico to comment whether the rule formulated by this Court in *Ker* should retain its vitality in the purely domestic context, as reaffirmed in *Frisbie v. Collins*, 342 U.S. 519 (1952). Mexico submits that the court below was correct in its discriminating analysis and in declining to apply the *Ker* rule mechanically in an international abduction case, as the United States urges. (Pet. Br. at 11-17). Blind adherence to doctrines formulated in another era, and disregard of international agreements to combat crime, will not further international efforts to bring criminals to justice.

It is true that numerous lower federal courts have struggled in recent years with various aspects of forcible seizure of suspects abroad in disregard of extradition treaties, and that they have felt bound by this Court's pronouncement in *Ker*. Their decisions are, nevertheless, distinguishable from the facts here because of such factors as non-involvement by agents of the United States in the forcible removal of the suspect from foreign territory;[20] rendition of the suspects, or active assistance in their rendition to the United States, by the authorities of the territorial sovereign;[21] seizures of suspects in international waters,[22] or the tacit condonation of the abduction by the sovereign in whose territory the abduction occurred.[23]

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[20] *E.g.*, *United States v. Lira*, 515 F.2d 68, 70-71 (2d Cir. 1975).

[21] *E.g.*, *United States v. Toro*, 840 F.2d 1221, 1229 (5th Cir. 1988); *see also Verdugo-Urquidez*, *supra*, 939 F.2d at 1353 n. 12 (citing cases).

[22] *E.g.*, *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

[23] *E.g.*, *Matta-Ballesteros v. Henman*, 896 F.2d 255, 260 (7th Cir.), *cert. denied*, ___ U.S. ___ (1990); *see also Verdugo-Urquidez*, *supra*, 939 F.2d at 1349 n. 9 and 1353 n. 12. (citing cases).

The United States pleads with the Court to reaffirm the *Ker* rule in this case for the reason that "immunizing a defendant from *all* prosecution is too high a price to pay for an illegal arrest." (Br. at 17; emphasis added). As Mexico pointed out earlier, the plea's premise is both false and disingenuous. Mexico does not appear in this Court in support of "immunizing" the respondent from prosecution;[24] it respectfully asks the Court to recognize and enforce its right to try the respondent in its courts—a right which the United States acknowledged and agreed to in the extradition treaty, but which the United States seeks to deny to Mexico in this case.

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[24] Mexican authorities commenced a criminal investigation in 1985 into the kidnaping and murder of DEA agent Enrique Camarena Salazar and Alfredo Zavala Avelar. Warrants of arrest were issued for Rafael Caro Quintero, Ernesto Fonseca Carrillo, and others in the state of Jalisco (Guadalajara) on charges of illegal deprivation of freedom in the form of abduction, homicide, and various narcotics offenses. They were charged with the offenses named on September 19, 1989, and were tried and convicted on December 12, 1989. The court imposed the maximum penalty on both defendants, *viz.*, 40 years imprisonment, various fines and forfeiture of properties. The convictions were affirmed on appeal on August 10, 1990, by the Third District Criminal Court of the State of Jalisco. Nine of their principal associates were also convicted and sentenced for their complicity in the offenses.

In addition, Caro Quintero, Fonseca Carrillo and twenty-one of their associates were convicted and sentenced in the Federal District (Mexico City) for narcotics offenses, firearms offenses, criminal association and illegal deprivation of freedom offenses. In that case, Caro Quintero was sentenced to a separate 34-year prison term and Fonseca Carrillo was sentenced to a separate 11-1/2 year term. Their twenty-one associates received sentences ranging from 12-1/2 to 14-1/4 years, plus fines and forfeitures.

A third person, believed to be a principal in the Camarena case, Miguel Angel Félix Gallardo, has also been arrested and is being tried, together with nine of his associates in the Federal District (Mexico City) on various narcotics trafficking, firearms and bribery charges. They have been in custody since April 1989.

III. INTERNATIONAL LAW MANDATES THAT RESPONDENT BE RETURNED TO MEXICO

This Court has uniformly recognized that prosecutions in American courts of violations of treaties and international law require the restoration of the status quo ante, and the release of persons or property prosecuted or seized in violation of the international commitments of the United States. *See e.g., United States v. Rauscher*, 119 U.S. 407 (1886) (prosecution in violation of extradition treaty); *Cook v. United States*, 288 U.S. 102 (1933) (seizure of property in violation of Convention to Prevent Smuggling); *Ford v. United States*, 273 U.S. 593 (1927) (same); *The Paquete Habana*, 175 U.S. 677 (1900) (condemnation of fishing vessels as price of war in violation of international law); *Cosgrove v. Winney*, 174 U.S. 64 (1899) (prosecution for an offense committed prior to extradition). The court below was correct in relying on these decisions in formulating its order that the respondent be allowed to return to Mexico.

In its Judgment (indemnity phase) in the *Chorzów Factory* case (Germany v. Poland), 1928 P.C.I.J., ser. A, No. 17, at 4, 47, the Permanent Court of International Justice ruled that restitution is the foremost remedy for international wrongful acts:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that *reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.* [Emphasis added.]

Among the ambitious studies in international law conducted under the auspices of Harvard University between the two world wars, the results of which were formulated in the form of "draft conventions," was a proposed convention on "Jurisdiction with Respect to Crime". 29

Am.J.Int'l L.Supp. 435 (1935).[25] The scholars who participated in this project agreed that the following rule comprised a fair statement of customary international law with respect to transborder abductions that violate treaties:

> Article 16. *Apprehension in Violation of International Law*
>
> In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

29 Am.J.Int'l L.Supp. at 623.

In commenting on the rule, the project stated: "It is everywhere agreed of course, that 'recourse to measures in violation of international law or international convention' in obtaining custody of a person charged with a crime entails an international responsibility which must be discharged by the release or restoration of the person taken, indemnification of the injured State, or otherwise'." *Id.* at 623-24. Writers and publicists on international law are near unanimous that the appropriate municipal law remedy for the United States' violation of the extradition treaty is respondent's discharge from the custody of the courts and his return to Mexico.

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[25] The Reporter and the Assistant Reporter of the project were Prof. Edwin D. Dickinson and Prof. William W. Bishop, Jr., respectively.

The advisory panel on the project consisted of a veritable Who's Who of American international law scholars and practitioners at the time: Judge Learned Hand; George W. Wickersham, former Attorney General of the United States; Elihu Root, former Secretary of State; Manley O. Hudson, former judge of the Permanent Court of International Justice and a member of the Permanent Court of Arbitration; Green H. Hackworth, Legal Adviser of the Department of State; Charles Chaney Hyde and James Brown Scott, former Solicitors of the Department of State; Philip C. Jessup, a future American judge on the International Court of Justice.

A former President of the Permanent Court of International Justice, and one of the most distinguished scholars on international law in the English-speaking world, Hersh Lauterpacht, stated:

> "The duty to respect the territorial supremacy of a foreign State must prevent a State from performing acts which, although they are according to its personal supremacy within its competence, would violate the territorial supremacy of this foreign State. A State must not perform acts of sovereignty in the territory of another State."

1 *Oppenheim's International Law* 295 (Lauterpacht ed., 8th ed. 1955). To illustrate such an international delinquency, and the remedy therefore, Judge Lauterpacht refers to abductions from another State's territory:

> It is therefore a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of a crime. Apart from other satisfaction, *the first duty of the offending State is to hand over the person in question to the State in whose territory he was apprehended.* [Emphasis added].

Id. n. 1.

Contemporary American, English, Canadian and Latin American scholars and publicists support the view. *See e.g.*, Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution in International Law, Continued*, 84 Am.J.Int'l L. 444, 474, 481 (1990); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 Minn.L.Rev. 91, 105 (1953); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 Brit.Yb.Int'l L. 265, 266 (1952); Lewis, *Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Detentus? Sidney Jaffee: A Case in Point*, 28 Crim.L.Q. 341, 348 (1986); Garcia-Mora, *Crim-*

inal Jurisdiction of a State Over Fugitives Brought From a Foreign Country by Force or Fraud: A Comparative Study, 32 Ind.L.J. 427, 430 (1957).

This Court's uniform holdings, beginning with *Rauscher*, *supra*, and the foregoing authorities support the view that if there was no jurisdiction in a State to make the original arrest or seizure, because it was in violation of a treaty or of international law, there is no jurisdiction in the courts to subject the person or property to its process.[26] Restoration of the status quo ante is the only proper remedy for the violation of international law that occurred here.

CONCLUSION

For the foregoing reasons, the Court of Appeals judgment ordering the respondent's repatriation should be affirmed.

Respectfully submitted,

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March 5, 1992.

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[26] The United States' reliance on *The Ship Richmond v. United States*, 9 Cranch (13 U.S.) 102 (1815) (Pet. Br. at 14 n.8) is misplaced. The holding of that case cannot be reconciled with this Court's decisions, *supra*, and *Richmond* must be regarded as having been overruled.